5-30-2012

Williams v. State Respondent's Brief Dckt. 38349

IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL C. WILLIAMS	)	
	)	
Petitioner-Appellant,	)	NO. 38349
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

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Nature of the Case

Michael Charles Williams appeals from the judgment dismissing his petition for post-conviction relief. On appeal, Williams argues that the district court erred in summarily dismissing his claim that trial counsel was ineffective for allegedly abandoning Williams' claim of self-defense at his trial for first degree murder.

Statement of Facts and Course of Underlying Criminal Proceedings

In February 2005, Williams shot and killed Chris Adams during a verbal altercation outside of a bar. (#33019 Trial Tr.,[1] p.94, Ls.13-24, p.105, L.21 – p.108, L.6, p.130, L.5 – p.133, L.1, p.148, L.15 – p.151, L.5, p.222, L.20 – p.226, L.6.) Williams and his brother, Doug, had been leaving the bar when Roy Ramirez – who had just left the bar but who had come back to pick up his friends, Chris Adams and Jose Martinez – backed his vehicle up to the door of the bar and inadvertently got too close to Doug. (#33019 Trial Tr., p.97, L.7 – p.101, L.10, p.145, L.13 – p.146, L.9.) Doug walked to the front of Roy's truck, looked in the window, and he and Roy "exchanged fingers." (#33019 Trial Tr., p.101, Ls.11-13, p.116, Ls.18-23, p.146, Ls.7-9.) Williams and Doug then continued walking toward Williams' vehicle. (#33019 Trial Tr., p.101, Ls.13-17,

[1] At the state's request, the district court took judicial notice of several records and transcripts prepared in connection with the underlying criminal case. (See R., pp.264-67; Tr., p.5, L.9 – p.7, L.9.) The Idaho Supreme Court has likewise taken judicial notice of the clerk's record, reporter's transcripts and court file in Williams' appeal from the underlying criminal case, State v. Williams, Docket No. 33019. (Order Granting Motion To Take Judicial Notice, filed July 8, 2011.)

p.146, L.21 – p.147, L.16.) Roy and his friend, Jose Martinez, got out of Roy's truck and waited by the door for Chris and Ramon to come out of the bar. (#33019 Trial Tr., p.101, L.15 – p.103, L.7.)

Ramon came out of the bar first, followed shortly thereafter by Chris. (#33019 Trial Tr., p.103, L.4 – p.104, L.17, p.128, Ls.7-22, p.129, L.22 – p.130, L.4.) At that point, Williams was sitting in his truck with the door open and his brother, Doug, was "on the passenger side, putting his coat away and walking towards the front of the truck ready to fight." (#33019 Trial Tr., p.105, Ls.1-20, p.130, L.25 – p.131, L.2, p.146, L.23 – p.147, L.16, p.148, L.23 – p.149, L.6.) When Chris learned that Doug had flipped Roy off, he threw down his beer bottle, said "Fuck this," and began walking towards Williams' truck; Ramon followed about 15 feet behind. (#33019 Trial Tr., p.104, Ls.18-25, p.116, L.18 – p.118, L.9, p.128, L.17 – p.129, L.10, p.130, Ls.10-24, p.148, Ls.15-22.) As Chris approached Williams' truck, he asked Williams "what the fuck was his problem." (#33019 Trial Tr., p.105, L.25 – p.106, L.16.) Williams responded, "[Y]ou just fucked with the wrong person," and he pulled out a gun. (#33019 Trial Tr., p.106, L.22 – p.107, L.19, p.150, Ls.14-17, p.154, Ls.17-24.) Williams then shot Chris three times in the chest, killing him. (#33019 Trial Tr., p.94, Ls.13-24, p.107, L.20 – p.108, L.6, p.132, L.15 – p.133, L.1, p.150, L.22 – p.151, L.5.)

The state charged Williams with first degree murder, with an enhancement for using a firearm in the commission of the offense. (#33019 R., pp.40-41.) At trial, Williams testified that he had acted in self-defense (#33019

Trial Tr., p.221, L.14 – p.226, L.16, p.229, L.3 – p.230, L.17, p.232, Ls.1-10, p.235, L.15 – p.238, L.13, p.240, L.18 – p.241, L.23), and the jury was instructed accordingly (#33019 Trial Tr., p.248, Ls.13-16, p.252, L.14 – p.254, L.22; #33019 R., pp.113, 121-24). Defense counsel also argued to the jury that it should find from the evidence that Williams acted in self-defense. (See #33019 Trial Tr., p.281, Ls.3-6, p.281, L.18 – p.282, L.25, p.283, Ls.20-23.) Ultimately, the jury rejected Williams' self-defense claim, but it also rejected the state's theory that Williams was guilty of murder, instead returning a verdict finding Williams guilty of the lesser included offense of voluntary manslaughter and of using a firearm in the commission of that offense. (#33019 Trial Tr., p.291, L.21 – p.292, L.25; #33019 R., pp.137-38.) The court entered judgment on the jury's verdict and imposed a unified sentence of 30 years, with 25 years fixed. (#33019 R., pp.146-47, 160-62.) Williams' conviction and sentence were affirmed on appeal. State v. Williams, Docket No. 33019, 2007 Unpublished Opinion No. 555 (Idaho App., August 16, 2007) (review denied).

Statement of Facts and Course of the Post-Conviction Proceedings

Williams filed a *pro se* petition for post-conviction relief, and an affidavit in support thereof, alleging prosecutorial misconduct, judicial bias/misconduct, ineffective assistance of trial counsel, ineffective assistance of appellate counsel, conflict of interest, juror bias/prejudice, and cumulative error. (R., Vol. I, pp.8-84; see also R., Vol. I, pp.103-17 (supplemental petition).) Among his ineffective assistance of counsel claims, Williams alleged that trial counsel was ineffective for failing to "properly" pursue and argue Williams' claim of self-defense,

including by failing to call certain witnesses and present evidence that Williams believed was relevant to that defense. (See generally R., Vol. I, pp.18-34.) At Williams' request, the district court appointed counsel to represent Williams in the post-conviction proceedings. (R., Vol. I, pp.85-88, 100, 155-56.)

The state answered Williams' petition and also filed a motion for summary disposition, requesting that the petition be dismissed in its entirety. (R., Vol. I, pp.121-36, 198-203.) The court conducted a hearing on the motion (see generally Tr., pp.5-57), after which the parties submitted post-hearing briefs and Williams submitted additional evidence and affidavits (R., Vol. II, pp.271-344). After considering all of the information before it, including the record of the underlying criminal proceedings, the district court granted the state's motion for summary dismissal as to all but one claim in the petition. (R., Vol. II, pp.354-375.) Following an evidentiary hearing (see generally Tr., pp.58-176), the court dismissed the remaining claim (R., Vol. II, pp.420-27) and subsequently entered a judgment dismissing Williams' petition in its entirety (Judgment of Dismissal, filed 3/26/12 (Augmentation)). Williams timely appeals. (R., Vol. II, pp.428-30.)

ISSUES

Williams states the issues on appeal as:

> 1. Was summary dismissal inappropriate because counsel's act of abandoning self-defense and thereby conceding guilt of voluntary manslaughter against the repeat and clear direction of Mr. Williams was constitutionally deficient performance subject to a presumption of prejudice?
>
> 2. In the alternative, was summary dismissal of the claim that counsel was ineffective in abandoning self-defense erroneous because there was a genuine issue of material fact as to whether counsel's deficient performance was prejudicial under *Strickland*?
>
> 3. In the second alternative, was summary dismissal inappropriate because the District Court failed to analyze whether counsel's actions in abandoning self-defense resulted in a denial of fundamental constitutional rights which could not be waived without Mr. Williams' consent?
>
> 4. Should this case be remanded for further proceedings because the District Court did not address all the claims in the petition?

(Appellant's brief, p.9.)

The state rephrases the issues on appeal as:

1. Has Williams failed to show error in the summary dismissal of his ineffective assistance of counsel claims related to trial counsel's alleged failure to pursue Williams' self-defense theory?

2. Has Williams failed to show any basis for remand?

ARGUMENT

I.
Williams Has Failed To Show Error In The Summary Dismissal Of His Ineffective Assistance Of Counsel Claims Related To Trial Counsel's Alleged Failure To Pursue Williams' Self-Defense Theory

A. Introduction

The district court summarily dismissed all but one of Williams' allegations of ineffective assistance of counsel. (R., Vol. II, pp. 354-75.) Williams argues that the district court erred, claiming that his allegations established issues of material fact that, at a minimum, required an evidentiary hearing on what he characterizes as his "overarching claim of ineffective assistance [of counsel] in failing to adequately present the defense of self-defense at trial." (Appellant's brief, pp.9-10.) Review of the record shows Williams' appellate arguments to be without merit.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Williams Has Failed To Show From The Record That He Presented Any Issue Of Material Fact Requiring An Evidentiary Hearing On The Dismissed Claims

"To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal "if the applicant's evidence raises no genuine issue of material fact" as to each element of the petitioner's claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297.

In order to establish a prima facie claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174,

1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Bare assertions and speculation, unsupported by specific facts, do not make out a prima facie case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

1. Williams' Claim That Trial Counsel Wholly Abandoned A Self-Defense Theory And Thereby Conceded Williams' Guilt To Voluntary Manslaughter Was Not Raised To The District Court And Is Disproved By The Record

Williams' petition alleged numerous claims of ineffective assistance of trial counsel, including a claim that counsel failed to "properly present" Williams' self-defense theory at trial. (R., Vol. I, pp.33-34; see also R., Vol. II, pp.305-306 (affidavit in which Williams averred that he "specifically advised and instructed" trial counsel to pursue self-defense theory).) Williams subsequently expounded on this claim in briefing to the district court, arguing that defense counsel actually "abandoned the defense of self-defense and dedicated herself solely to a verdict of not guilty of the first-degree murder charge, contrary to the known and stated wishes of the Petitioner" and that such was "***not*** trial strategy." (R., Vol. II, p.237 (emphasis original).) The district court summarily dismissed this allegation pursuant to the state's motion, ruling that trial counsel's choice of what defense to pursue ultimately was a tactical decision. (R., Vol. II, p.367.) Specifically, the court reasoned:

> Williams claims that he requested that Campbell [defense counsel] present a theory of self-defense. Campbell did not present this theory; instead she appears to have sought to primarily defeat the charges of first and second degree murder, which she did successfully.

> Campbell's decision not to focus on the defense of self-defense falls within the area of tactical decisions. [Citation omitted.] Additionally, Williams admitted to the police that he was not afraid of Adams. With that admission available to the State, it was reasonable for Campbell not to pursue the affirmative defense. ...

(R., Vol. II, p.367.)

Williams challenges the district court's ruling, arguing that by "not presenting self-defense," trial counsel effectively "conceded" Williams' guilt to voluntary manslaughter. (Appellant's brief, p.16.) Williams further argues that such "concession of guilt" without his consent so undermined the proper functioning of the adversarial process as to trigger a presumption of prejudice entitling him to a new trial. (Appellant's brief, pp.13-16 (citing, *e.g.*, United States v. Cronic, 466 U.S. 648 (1984)). Williams has failed to show error in the summary dismissal of his claim for at least three reasons.

First, Williams never alleged in his post-conviction petition or any of his supporting materials that trial counsel "conceded" his guilt to voluntary manslaughter. (See generally R., Vol. I, pp.8-84 (petition and affidavit), pp.103-17 (supplemental petition); R., Vol. II, pp.206-57 (objection to motion for summary disposition), pp.285-344 (post-hearing brief and affidavits).) Rather, Williams consistently claimed only that trial counsel failed to effectively present his theory of self-defense. (Id.) Having failed to raise his claim of a "concession" in his petition, and having not received a ruling on that claim by the district court, it is not properly before this Court on appeal. See Small v. State, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998) (declining to consider for first time on appeal claims not raised in post-conviction petition).

Second, even if Williams' claim were properly before this Court he has failed to identify from the record any actual concession by counsel to the voluntary manslaughter charge. Williams' claim of concession appears to hinge solely on the fact that, during closing argument, trial counsel did not utter the words "self-defense" but did make reference to the "heat of passion and a sudden quarrel." (Appellant's brief, p.7 (citing #33019 Trial Tr., p.281, Ls.13-17, p.283, Ls.13-18).) Even assuming, as Williams' suggests, that trial counsel abandoned a self-defense theory, the mere fact that counsel suggested to the jury that it *could* find from the evidence one element of voluntary manslaughter does not itself amount to a concession of Williams' guilt to that charge. Counsel did successfully argue to the jury that the state not had met its burden of proof on the murder charge. However, at no point during her opening statement or closing argument did trial counsel concede that the state had proved the elements of voluntary manslaughter, nor did she ask the jury to return a verdict finding Williams guilty of that charge. Because Williams has failed to identify from the record any concession of guilt to the voluntary manslaughter charge, his claim that such "concession" was presumptively prejudicial necessarily fails.

Finally, even if the mere failure to pursue a self-defense theory were tantamount to a concession of guilt to voluntary manslaughter, Williams' claim that trial counsel failed to pursue a self-defense theory in the underlying criminal

case is affirmatively disproved by the record.[2] During her opening statement, defense counsel discussed what she believed the evidence would show and then advised the jury:

> One of the things that you have to determine, because the charge is first-degree murder, you have to determine if the State proves beyond a reasonable doubt the killing was willful, deliberate, premeditated, and intentional.
>
> I think, ladies and gentlemen of the jury, by the time you hear the evidence, you will find that the State has not met its burden with regard to first-degree murder.

(#33019 Trial Tr., p.93, Ls.6-14.) Williams argues that the cited portion of trial counsel's opening statement constituted an abandonment of self-defense and a concession to manslaughter. (Appellant's brief, pp.6-7, 18.) Williams is incorrect. There is nothing inconsistent about suggesting to the jury that it would not find the state had not met its burden of proving first degree murder and, at the same time, maintaining a claim of self-defense. In fact, trial counsel spent the majority of her opening statement setting the scene for Williams' self-defense theory. (See #33019 Trial Tr., p.91, Ls.16-24 (victim and his companions were upset at Williams and his brother and intended to "kick their ass"), p.92, Ls.2-6 (victim threw down bottle and threatened to kill Williams), p.92, Ls.7-15 (Williams

[2] The state recognizes the district court's statement that counsel "did not present" a self-defense theory. (R., Vol. II, p.367.) However, because the standard of review on appeal is one of free review of the record, see, e.g., Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992), this Court is not bound by the district court's finding. Notably, the district judge who presided over the post-conviction proceedings was not the same judge who presided over the trial and who specifically recognized in connection with Williams' sentencing that Williams had presented self-defense defense at trial. (See #33019 Trial Tr., p.326, Ls.10-19.)

pulled gun to deter victim – who was "extremely intoxicated, very agitated" and "coming towards him" – "from coming any further and carrying out that threat"), p.92, Ls.17-21 (victim got so close to Williams that Williams could not leave or even close car door, and victim grabbed Williams and scratched his neck).) These portions of trial counsel's opening statement, which go completely unmentioned by Williams on appeal, clearly show trial counsel did not abandon a theory of self-defense.

That trial counsel did not abandon a self-defense theory or concede Williams' guilt to voluntary manslaughter is also evidenced by counsel's cross-examination of the state's witnesses and her presentation of evidence in the defense case-in-chief. Three individuals who were with the victim on the night in question testified for the state. (See generally #33019 Trial Tr., pp.95-155.) Trial counsel cross-examined each of these witnesses and elicited from them testimony that supported Williams' theory of self-defense. (See #33019 Trial Tr., p.116, L18 – p.117, L.14 (Roy Ramirez was agitated about "finger-throwing incident" and told friends about it), p.117, L.15 – p.118, L.11 and p.138, L.22 – p.139, L.13 (news of "finger-throwing incident" incited anger in victim, who threw down beer bottle and took off toward Williams), p.123, Ls.14-17 and p.136, L.10 – p.137, L.22 (victim and companions discussed and/or intended to kick Williams' ass), p.140, Ls.6-19 and p.155, Ls.3-12 (victim got so close to Williams that he could not shut car door), p.154, Ls.11-23 (Williams may have said, "You got the wrong guy" instead of "You fucked with the wrong guy").) Trial counsel also cross-examined the detective who interviewed Williams and elicited from

him a concession that, during the interview, Williams told the detective he had felt threatened during his encounter with the victim. (#33019 Trial Tr., p.201, L.7 – p.202, L.2.) Finally, trial counsel called Williams who testified both on direct and cross-examination that he felt threatened by the victim and his companions and that he shot the victim to protect himself from what he perceived as a threat of death or other bodily harm. (#33019 Trial Tr., p.220, L.1 – p.238, L.13, p.241, Ls.11-23.) Again, while trial counsel's efforts in the above regard go virtually unmentioned by Williams on appeal, they nevertheless demonstrate, contrary to Williams' assertions, that trial counsel did not abandon Williams' self-defense theory at trial. In fact, it is presumably *because* defense counsel presented evidence to support a self-defense theory that the jury was ultimately instructed on that defense. (See #33019 R., pp.113, 121-24; #33019 Trial Tr., p.248, Ls.13-16, p.252, L.14 – p.254, L.22); e.g., State v. Johns, 112 Idaho 873, 880-81, 736 P.2d 1327, 1334-35 (1987) (trial court required to instruct jury on defense theory only if supported by evidence).

Finally, contrary to Williams' assertions (Appellant's brief, p.7), a review of trial counsel's closing argument shows, unequivocally, that counsel neither abandoned Williams' self-defense theory nor conceded his guilt to voluntary manslaughter. Trial counsel did make a brief reference to Williams having acted in the "heat of passion and a sudden quarrel." (#33019 Trial Tr., p.281, Ls.13-17.) However, trial counsel spent the majority of her closing argument arguing to the jury that Williams acted in self-defense. Specifically, counsel argued:

> Mr. Adams, whether he's drunk, whether he was drinking, whatever his problem was, went over there to kick some ass. **He**

> **thought he was going to get somebody that couldn't defend themselves. Unfortunately, he did get someone who could defend themselves.**
>
> [Arguing only conclusion jury could draw from autopsy photo was that victim sustained three bullet wounds.]
>
> One of the State's own witnesses, Mr. Sanchez, puts Mr. Adams clear in the vehicle with Mr. Williams before the shots are fired. He's practically on top of him. If that's not heat of passion and a sudden quarrel, I've never heard of it.
>
> This is not a murder case. It's definitely not a first-degree murder case. It's not even a murder case. There's no willfulness. There's no deliberateness. There's no premeditation. **You've got an individual that's approaching another individual threatening to kill him, and another man taking out a weapon to protect himself**. That's simply what we have here.
>
> Mr. Williams [said], "Stop, please stop. You got the wrong man." Does that affect Mr. Adams? No. He continues to come forward.
>
> The only thing you can conclude from the evidence is that Mr. Adams – or Mr. Williams, unfortunately, was forced to make a terrible decision. **Do I run the risk of receiving serious bodily injury or maybe even death for myself, or do I defend myself like it my right under the law?**

(#33019 Trial Tr., p.281, L.1 – p.282, L.9 (emphasis added).) After referring no less than three times to the fact that Williams was defending and/or protecting himself, trial counsel then directed the jury's attention to the jury instructions on self-defense and asked the jury to consider those instructions in its deliberations. (#33019 Trial Tr., p.282, Ls.10-25.) Trial counsel ultimately concluded her argument by asking the jury to "put yourself in Mr. Williams's situation, and **can you say beyond a reasonable doubt that what Mr. Williams did that day in defending himself was wrong**? I don't think you can do that." (#33019 Trial Tr., p.283, Ls.20-23 (emphasis added).) When viewed in its entirety, trial

counsel's closing argument was clearly primarily a plea for the jury to acquit Williams on the basis that he had acted in self-defense. Williams' arguments to the contrary are based either on a misreading or a misrepresentation of the actual trial record and, as such, are without merit. (See Appellant's brief, p.7 (arguing, *inter alia*, that trial counsel only made "passing reference to Mr. Williams defending himself" and "did not attempt to argue that self-defense applied," "did not set out the law of self-defense," and "did not argue that Mr. Williams was resisting an attempt to murder ... or great bodily injury").)

2. Williams Failed To Present An Issue Of Material Fact Entitling Him To An Evidentiary Hearing On Any Of His Claims That Trial Counsel Was Ineffective For Not Calling Certain Witnesses, Presenting Certain Arguments Or Making Certain Objections In Furtherance Of Williams' Theory Of Self-Defense

Williams argues that even if he was not entitled to relief as a matter of law on his claim that trial counsel was ineffective for "abandoning" his self-defense theory, summary dismissal was nevertheless inappropriate because, Williams contends, "there was a genuine issue of material fact as to whether the failure to contest the manslaughter charge was deficient performance which prejudiced Mr. Williams." (Appellant's brief, pp.16-17.) To support his argument, Williams cites a number of examples of actions he contends trial counsel could have taken in furtherance of his self-defense claim. Specifically, he contends that trial counsel should have (1) impeached the investigating officer and/or moved for a mistrial based on what Williams claims was a solicitation of false testimony; (2) called Williams' brother, Doug, as a witness at trial; (3) offered evidence of the victim's history of and reputation for violence; (4) offered into evidence the

victim's toxicology report; and (5) objected to and moved to strike allegedly improper statements made by the prosecutor in closing argument. (Appellant's brief, pp.16-24.) The first of these claims is not properly before this Court because it was neither alleged in Williams' petition nor addressed by the district court in its order of summary dismissal. The remaining claims amount to nothing more than a series of examples of how, in hindsight, Williams believes his case could have been tried better; none of the claims present an genuine issue of material fact that would entitle Williams to an evidentiary hearing.

a. Williams' Claim That Trial Counsel Was Ineffective For Failing To Impeach Detective Bench And/Or Move For A Mistrial Based On Detective Bench's Testimony Is Not Properly Before This Court On Appeal

Detective Brad Bench interviewed Williams after he was taken into custody for shooting and killing Chris Adams. (#33019 Trial Tr., p.184, L.20 – p.187, L.10.) At trial, Detective Bench testified that Williams made several *Mirandized* admissions during the interview, including the following: that he had a weapon and fired it (#33019 Trial Tr., p.187, L.23 – p.188, L.15); that he retrieved the gun from his console and concealed it under his armpit (#33019 Trial Tr., p.189, L.8 – p.190, L.10); that, as Adams got close, he "trained" the gun on him and fired three times, aiming at "center mass" (*i.e.*, Adams' chest area), consistent with his military training (#33019 Trial Tr., p.191, L.23 – p.192, L.16); that he was not afraid for his life (#33019 Trial Tr., p.193, Ls.14-18); that he believed the shooting would cause Adams' death (#33019 Trial Tr., p.194, Ls.13-

24); and that Adams did not have any weapon that would have made Williams fear for his life (#33019 Trial Tr., p.193, Ls.5-13, p.194, L.25 – p.195, L.5).

On cross-examination, Williams' defense counsel successfully impeached portions of Detective Bench's direct testimony, getting the Detective to admit that what Williams actually said during the interview was that it "*wasn't* like" he had the gun "trained" on Adams (#33019 Trial Tr., p.195, L.13 – p.197, L.21 (emphasis added)), and that Williams *did* feel threatened and "a little frightened" by Adams and his companions because, before Williams shot him, someone in the crowd said to Adams, "Get your gun" (#33019 Trial Tr., p.201, L.2 – p.202, 3L.2).

For the first time on appeal, Williams argues that trial counsel should have done more to impeach Detective Bench's testimony (Appellant's brief, pp.19-22) and should also have objected and/or moved for a mistrial based on what he characterizes as "the prosecutor's solicitation and presentation of Officer Bench's apparently false testimony" (Appellant's brief, pp.22-23). Williams, however, failed to allege either of these claims in his post-conviction petition, either as independent bases for relief or as claims supporting his "overarching" theory that trial counsel failed to adequately present his theory of self-defense. (See generally R., Vol. I, pp.8-84 (petition and affidavit), pp.103-17 (supplemental petition); R., Vol. II, pp.206-57 (objection to motion for summary disposition), pp.285-344 (post-hearing brief and affidavits).) Because he failed to do so, neither claim is properly before this Court on appeal. See Small v. State, 132

Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998) (declining to consider for first time on appeal claims not raised in post-conviction petition).

b. Failure To Call Doug Williams As A Witness At Trial

Generally "counsel's choice of witnesses, manner of cross-examination, and lack of objection to testimony fall within the area of tactical, or strategic, decisions." Giles v. State, 125 Idaho 921, 924, 877 P.2d 365, 368 (Ct. App. 1994). Trial counsel's strategic and tactical decisions will not be second-guessed on review or serve as a basis for post-conviction relief under a claim of ineffective counsel unless the UPCPA petitioner has shown that the decision resulted from inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective review. Id.; Cunningham v. State, 117 Idaho 428, 430-31, 788 P.2d 243, 245-46 (Ct. App. 1990).

Williams alleged in his petition, and argues again on appeal, that trial counsel was ineffective for failing to call his brother, Doug, as a witness at trial to corroborate Williams' claim of self-defense. (R., Vol. I, pp.26-27; R., Vol. II, p.300; Appellant's brief, pp.17, 23.) The district court summarily dismissed this claim, finding Williams had presented no admissible evidence to show that counsel's decision to not call Doug as a witness was due to ineffective representation. (R., Vol. II, pp.370-71.) On appeal Williams points to the affidavit of Doug Williams, in which Doug stated that he "had repeatedly contacted defense counsel offering to testify and that his testimony would have included his perceptions that night that both he and Michael were in danger of bodily harm or even death by Messrs. Adams, Sanchez, Ramirez, and Martinez."

(Appellant's brief, p.17 (citing R., Vol. II, pp.326-27).) As pointed out by the district court, however, trial counsel "was in the best situation to determine Doug's credibility and the advantages of calling him to testify." (R., Vol. II, p.371.) Williams has not identified from the record any admissible evidence to suggest that counsel's decision to not call Doug was due to inadequate preparation, ignorance of the law, or any other objective shortcoming. Williams has therefore failed to show error in the summary dismissal of this claim.

c. Failure To Offer Evidence Of The Victim's Alleged Reputation For Violence

Williams alleged in his petition, and argues again on appeal, that counsel was ineffective for failing to present evidence "of Mr. Adams' and his companions' histories of and reputations for violence." (R., Vol. I, pp.28-29; Appellant's brief, p.23.) Williams argues that such evidence would have been admissible pursuant to I.R.E. 404(a)(2) and "would have gone to support an argument that the state could not carry its burden of proving beyond a reasonable doubt that Mr. Williams was not acting in self-defense." (Appellant's brief, p.23.) Williams fails to acknowledge, however, that nowhere in his petition or supporting materials did he present any admissible evidence to demonstrate that Adams and his companions actually had "histories of and reputations for violence." Having failed to do so, Williams failed to present a genuine issue of material fact with respect to either the deficient performance or prejudice prongs of this claim.

d. Failure To Offer Into Evidence The Victim's Toxicology Report

Williams alleged in his petition, and argues again on appeal, that trial counsel was ineffective for failing to offer into evidence a toxicology report showing that, on the night Williams shot him, Chris Adams had an ethanol level of 249 mg/dL. (R., Vol. I, pp.19-20, 57; Appellant's brief, pp.17, 23.) Williams argues that the toxicology report was relevant and should have been introduced to show a "level of intoxication that *could have* induced or magnified aggressive and dangerous behavior by Mr. Adams" (Appellant's brief, p.17 (emphasis added)) and to "explain why [Adams] was aggressive and did not respond to repeated request to stop advancing on Mr. Williams" (Appellant's brief, p.23). Williams, however, offered no evidence in the form of expert opinion or otherwise to support a conclusion that the victim's level of intoxication made him particularly aggressive or dangerous on the night in question. Williams' speculation below and on appeal that it *could have done so* is not evidence and does not create a material issue of fact.

e. Failure To Object To Allegedly Improper Statements Made By The Prosecutor During Closing Argument

Prior to trial, the state moved in limine to introduce the testimony of Williams' ex-wife that, while they were married, Williams always carried a gun and was "always looking for the opportunity to shoot someone in self defense." (#33019 R., pp.70-74; see generally #33019 Trial Tr., pp.1-24.) The district court ruled the testimony inadmissible and excluded it from the state's case-in-chief. (#33019 Trial Tr., p.20, L.23 – p.24, L.12; see also p.25, L.16 – p.45, L.14

(argument on and denial of renewed motion), p.206, L.25 – p.212, L.2 (argument on and denial of second renewed motion).)

Williams argues on appeal that, during closing argument, the prosecutor impermissibly referred to and made use of the above-excluded evidence, and that trial counsel was ineffective for not objecting to the prosecutor's allegedly improper argument. (Appellant's brief, pp.18-19.) Williams did not allege this ineffective assistance of counsel claim in his petition. (See R., Vol. I, pp.8-84.) He did, however, raise the claim in response to the state's motion for summary disposition (R., Vol. II, p.302), and the district court addressed and disposed of Williams' argument as if it were a claim in the petition (R., Vol. II, p.373).[3] Specifically, the court found that trial counsel's decision to not object to the prosecutor's closing argument "falls within the area of tactical, or strategic, decisions." (R., Vol. II, p.373 (citing Giles v. State, 125 Idaho 921, 924, 877 P.2d 365, 368 (Ct. App. 1994).) The court also found no prejudice because Williams failed to demonstrate how objecting to the prosecutor's argument would have affected the outcome of his case. (R., Vol. II, p.373.) The record supports the district court's conclusions because, contrary to Williams' assertions, the closing arguments he challenges cannot reasonably be deemed to have improperly put before the jury evidence not actually presented at trial.

[3] Because Williams did not actually raise this claim in his petition, it was not properly before the district court and is not properly before this Court on appeal. See Kelly v. State, 149 Idaho 517, 523-24, 236 P.3d 1277, 1283-84 (2010) ("It is clearly established under Idaho law that a cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal.").

In context, the arguments about which Williams complains are as follows:

> And what did [the victim] say? "What are you going to do with that [the gun]?
>
> And the response was, "You just fucked with the wrong guy." Because Mr. Williams was waiting for a confrontation. He had his gun there. He, he was waiting for a confrontation where he could shoot somebody if he got the opportunity.

(#33019 Trial Tr., p.264, Ls.1-7);

> He carries a loaded firearm around in his vehicle. Why? There wasn't any – he didn't testify to any specific threat from anyone. It's because he's hoping that just somebody is going to mess with him, and Chris Adam [sic] was just that unfortunate person who did it. He got the result of Mr. Williams's practice, just like he practiced, center of mass.

(#33019 Trial Tr., p.266, Ls.10-16);

> There were no weapons found there. So why pull [his gun] out? Because this was the plan that if anybody messed with him, they were going to get it.

(#33019 Trial Tr., p.268, Ls.12-14);

> He's [Williams] waiting for something. He's waiting in that car with the door open. He didn't shut it, and why not? Why didn't he leave? Why didn't he just – why didn't he shut his door and leave, instead of waiting all of that time? It's because he had another agenda, ladies and gentlemen. He had a loaded gun, and he's licensed to use it. So he did. And Chris Adams is the one that paid the price for that.

(#33019 Trial Tr., p.271, L.22 – p.272, L.5); and

> He pulled that gun, and he was a hunter. He stayed concealed like a hunter does. He kept that gun concealed, and he sucked that big game in. He let him walk all the way up to him until he was, he was a guaranteed kill; and then he shot Chris Adams three times, made sure he was going to die because he messed with the wrong person.

(#33019 Trial Tr., p.286, Ls.14-20).

Without citing the context in which they were made, Williams argues that the above arguments were necessarily based on the proposed testimony of Williams' ex-wife that was ruled inadmissible before trial. (Appellant's brief, pp.18-19.) Williams' claim lacks merit. At no point in his closing argument did the prosecutor mention Williams' ex-wife or refer to her non-existent testimony. Instead, the prosecutor's arguments focused on the evidence that was actually presented at trial and the reasonable inferences to be drawn from that evidence. That evidence (including Williams' own testimony) showed the following:

- Williams had a concealed weapons permit and carried a loaded firearm in his vehicle for what Williams testified was the general purpose of "self-defense" (#33019 Trial Tr., p.192, Ls.17-24, p.233, L.24 – p.234, L.11);
- Williams had a loaded gun on the night in question and concealed it from Chris Adams until Adams got close to Williams' vehicle (#33019 Trial Tr., p.189, L.21 – p.190, L.20, p.235, Ls.2-8);
- Williams received small arms training in the military and was trained to shoot at "center mass" (#33019 Trial Tr., p.192, Ls.12-16, p.233, Ls.11-23);
- There were no other weapons at the scene on the night in question (#33019 Trial Tr., p.173, L.17 – p.174, L.7, p.193, Ls.10-13);
- Williams knew that shooting someone three times in the chest would cause death (#33019 Trial Tr., p.194, Ls.13-24); and
- Before Williams shot Adams he said, "[Y]ou just fucked with the wrong person" (#33019 Trial Tr., p.106, L.22 – p.107, L.1, p.150, Ls.14-17, p.154, Ls.17-24).

The prosecutor asked the jury to conclude from the evidence that Williams shot and killed Adams without provocation or legal justification. The complained of arguments are not only consistent with the prosecutor's theory of the case, they are also entirely consistent with and supported by the foregoing evidence,

which the prosecutor had an absolute right to discuss. See State v. Sheahan, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003) (prosecutors have considerable latitude in closing argument and have the right to discuss the evidence and the inferences and deductions arising from therefrom); State v. Phillips, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007) (same). Because the arguments were proper, Williams has failed to show any objective deficiency or prejudice arising from trial counsel's decision to not object. Williams has failed to show error in the summary dismissal of this claim.

D. Williams' Argument That The District Court Erred By Not Addressing Unpled Claims Is Directly Contrary To The Law He Cites In Support Of The Argument

Williams next argues that the district court erred by not analyzing his ineffective assistance of counsel claim as also asserting a violation of his right to present evidence and his right to a jury trial. (Appellant's brief, pp.24-26.) Specifically, Williams argues that "abandonment of self-defense" was a violation of these rights and that the "lesson" from DeRushé v. State, 146 Idaho 599, 200 P.3d 1148 (2009), and Barcella v. State, 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009), "is that when a post-conviction petitioner alleges error by counsel ... the District Court must analyze the question ... not merely by the *Strickland* standard, but also by the standard of whether the fundamental constitutional right was improperly denied." (Appellant's brief, pp.25-26). This argument fails on its facts because, as already set forth in detail, the record establishes that trial counsel did not "abandon" self-defense at trial. Even if this argument's factual premise were not wrong, however, it would still fail because Williams is

advocating a "lesson" from DeRushé and Barcella that is exactly opposite from the holdings of those cases.

DeRushé pled that his counsel had violated his substantive right to testify by refusing to call him after he expressed his desire to exercise that right. DeRushé, 146 Idaho at 603, 200 P.3d at 1152. "The district court erred in analyzing DeRushé's claim as alleging ineffective assistance of counsel rather than as alleging denial of his constitutional right to testify on his own behalf." Id. Thus, the district court's error was analyzing a claim (ineffective assistance of counsel) other than the one pled (denial of the right to testify). Id. at 603-04, 200 P.3d at 1152-53. The Idaho Court of Appeals applied DeRushé in Barcella as follows:

> DeRushé ... does not stand for the proposition that a claim of ineffective assistance of counsel regarding the right to testify must also be analyzed as a direct constitutional violation. It certainly does not stand for the broad proposition that any time a claim of ineffective assistance of counsel is pled the district court must also address any potential underlying constitutional violation independently. Rather, ... the Supreme Court's concern [was] that the district court had not analyzed the claim that was alleged in that case.

Barcella, 148 Idaho at 476, 224 P.3d at 543. See also Rossignol v. State, 152 Idaho 700, ___, 274 P.3d 1, 6-7 (Ct. App. 2012) (applying DeRushé and Barcella to hold that when a petitioner pleads ineffective assistance of counsel there is no need to address an unpled claim of a direct constitutional violation).

Williams pled his trial counsel was ineffective in how she presented self-defense at trial. (R., Vol. I, pp.23-24, 26-28, 33-34.) He at no point pled independent violations of his right to present evidence or right to a jury trial

based on how self-defense was presented at trial. (See generally R., Vol. I, pp.8-40.) Applicable law demonstrates that the district court did not err by failing to address claims not pled by Williams.

II.

Williams Has Failed To Show Any Basis For Remand Of Claims He Contends Were Not Specifically Addressed By The District Court's Order Of Dismissal

The state moved for summary disposition of all of the claims and sub-claims asserted in Williams' petition. (R., Vol. I, pp.198-202; Vol. II, pp.271-77.) Williams objected to the motion. (R., Vol. II, pp.206-43, 285-304.) The district court then heard oral argument from both sides. (See generally Tr., pp.5-57.) The district court granted the motion in part, dismissing all claims except the claim of ineffective assistance of counsel for failing to move to suppress Williams' statements to the police. (R., Vol. II, pp.354-75.)

For the first time on appeal Williams argues that the district court erred by not specifically setting forth the grounds for dismissing his claims of a *Brady* violation and ineffective assistance of counsel for failing to investigate blood spatter and gunpowder residue evidence, failing to object to chain of custody, failing to move for a mistrial, failing to investigate evidence that his truck had been tampered with, and failure to object to information in the PSI. (Appellant's brief, pp.26-27.) Williams' appellate argument is belied by the record. In its order the district court specifically stated: "The State, in its motion, seeks summary disposition *of all of Williams' claims for post-conviction relief.* Williams has responded to the motion with supporting argument and affidavit *for the following claims only.*" (R., Vol. II, p.359 (emphasis added).) The district court

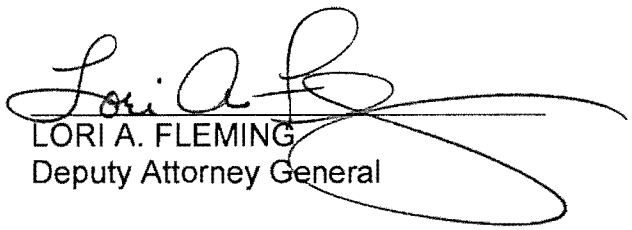
then addressed those claims (R., Vol. II, pp.359-74), and dismissed all of the claims in the petition save one (R., Vol. II, pp.374-75). It is clear from the record that the district court dismissed claims not specifically addressed for lack of supporting "argument and affidavit." Williams' claim that the district court "fail[ed] to rule" on certain claims (Appellant's brief, p.27) is belied by the record.

In addition, Williams' argument is contrary to law. Williams asserts that failure to specifically address the grounds for certain of his claims demonstrates an abuse of discretion. (Appellant's brief, p.27.) The applicable rules of civil procedure, however, while requiring a trial court to set forth its findings of fact and conclusions of law, I.R.C.P. 52(a), also specifically provide that failure to set forth findings of fact and conclusions of law may not be "assign[ed] as error" "unless the party raised such issue to the trial court by an appropriate motion," I.R.C.P. 52(b). Because the record establishes that the state moved for dismissal of all claims (R., Vol. II, p. 359), and the court granted the motion with only one exception (R., Vol. II, pp.374-75), any claim of error arising from lack of specific findings of fact or conclusions of law as to any dismissed claims was waived by Williams and cannot be the basis of a claim of error on appeal.

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the district court's orders summarily dismissing certain claims and denying Williams' petition for post-conviction relief.

DATED this 30th day of May 2012.



LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of May 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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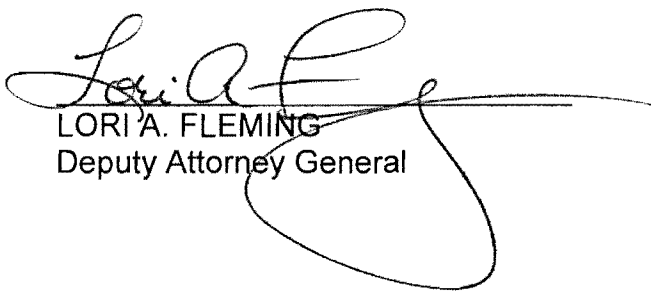

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